Supreme Court, U.S.
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No. 98-1337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRANK WAGNER,

Petitioner,

v.

JAMES P. CELEBREZZE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THOMAS J. LONGO

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trial Court and Court of Appeals properly considered Plaintiff's discharge under the political patronage line of cases represented by *Branti v. Finkel*, 445 U.S. 507 (1980).

2. Whether the District Court and Court of Appeals properly held that Plaintiff's discharge did not violate his First Amendment rights.

LIST OF PARTIES

The Petitioner in this case is Frank Wagner.

The Respondents in this case are James P. Celebrezze, individually and in his official capacity as Judge of the Court of Common Pleas, Division of Domestic Relations; Thomas J. Longo, individually; Frank D. Celebrezze, individually, Court of Common Pleas for Cuyahoga County, Ohio, Division of Domestic Relations; and the County of Cuyahoga.

ARGUMENT AND REASONS FOR DENYING THE WRIT

Defendant/Respondent Thomas J. Longo asserts that this case does not present any important or unsettled question of constitutional law under the First Amendment. Rather, Defendant Longo asserts this matter presents an appropriate application by the District Court and Court of Appeals of the existing First Amendment law embodied in this Honorable Court's cases, including *Branti v. Finkel*, 445 U.S. 507 (1980) and *Elrod v. Burns*, 427 U.S. 347 (1976). The "patronage line" of cases was the appropriate framework to analyze this case. Defendant Longo asserts the patronage cases are a subset of the "balancing test" line of cases exemplified by *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Connick v. Myers*, 461 U.S. 138 (1983). In patronage cases, the Court has recognized the weight of political affiliation in the balancing process.

Plaintiff/Petitioner incorrectly argues that Plaintiff Wagner's refusal to align his political support with that of Judge Celebrezze, for whom he was bailiff, has no relationship to the efficient operation or effective functioning of the court or the judge's office. However, both the District Court and the Court of Appeals recognized the intermeshed nature of the politics of Judge Celebrezze and Mr. Wagner and the political nature of the bailiff's job which Mr. Wagner held.

Plaintiff and the Defendants (other than the county and court) are all involved in local democratic politics. As recognized by the District Court and Court of Appeals, Mr. Wagner had voluntarily intermeshed his politics with those of Judge Celebrezze by both seeking and receiving Judge Celebrezze's support to run for mayor of Garfield Heights and subsequently for Democratic Ward Leader. Plaintiff apparently argues that political affiliation could not be at issue since Judge Celebrezze,

Mr. Wagner, Frank D. Celebrezze and Thomas J. Longo are all Democrats. However, political affiliation is not so narrowly limited as to be synonymous with party affiliation. Legitimate political affiliation issues extend not only to nominal party affiliation but also to specific political camps or factions within a political party, especially in areas such as Cuyahoga County where one party completely dominates local politics.

Both the District Court and Court of Appeals recognized that part of the bailiff's job is political in nature and that Mr. Wagner's conduct in eroding the judge's political base and thereby reducing his prospects for reelection were legitimate issues of political affiliation sufficient to sustain Mr. Wagner's discharge predicated upon his refusal to support the opposition ward leader candidate.

Defendant Longo asserts that the political patronage line of cases beginning with *Elrod*, *supra*, and its progeny are not a distinct constitutional theory or test, but rather represents a specific circumstance balancing the state's interest in an efficient workforce against the employee's First Amendment rights. Defendant asserts that in political patronage cases the courts have held, as a matter of law, that the political patronage criteria is an appropriate consideration or appropriate requirement for maintaining an efficient workforce which outweighs the employee's own First Amendment right in his political speech.

In *Elrod*, *supra*, this Honorable Court held, in a plurality opinion, that political alliance or allegiance, as a basis upon which to retain or terminate governmental employees was limited to "confidential" employees in "policymaking" positions. *Elrod*, *supra*, at 372. The Court in *Elrod* sought to balance the government's interests with that of the employee.

This Honorable Court in *Branti*, *supra*, affirmed and clarified *Elrod* holding that politically motivated dismissal were

only proper with respect to politically sensitive positions. The Court required the hiring authority to demonstrate that the party affiliation is an "appropriate" requirement for the effective performance of the office involved. *Branti*, *supra*, at 517.

The Sixth Circuit has determined that the position of bailiff for an individual judge is a position for which party affiliation is an appropriate requirement for effective performance of the office involved. *Balogh v. Charron*, 855 F.2d 356 (1988). The circuit found that determining the question of whether a specific position is subject to a political affiliation requirement is an objective test as opposed to being determined by the tasks which any particular employee performs within that job title. *Balogh*, *supra*, at 356-357.

Judge Celebrezze took the position with Mr. Wagner that part of Mr. Wagner's job was to preserve the judge's political support and in essence to get him reelected and not to create political opposition for him. The importance of this political affiliation is particularly significant in the context of the close and confidential working relationship between a judge and his bailiff. Certainly, a judge cannot be expected to retain as a confidential bailiff an individual with whom he has significant political differences which are leading to either an erosion of political support or the creation of political opposition. This is particularly true where the Plaintiff Wagner and Judge Celebrezze have a history of intertwining political issues into their employment relationship.

With respect to this Respondent, Thomas J. Longo, Petitioner's Complaint against Thomas Longo is predicated upon a theory of conspiracy to deprive Plaintiff of his constitutional rights. Plaintiff's conclusory allegations of conspiracy are insufficient. While neither the District Court nor Court of Appeals reached the issue of whether Plaintiff had put forth the evidence necessary to sustain the allegation of a conspiracy,

Defendant asserts there is no evidence in the record to support any such allegation. While Plaintiff's argument attempts to infer that Thomas Longo conspired to have Mr. Wagner terminated if he would not support opposition candidate Rose Lovano there is absolutely no evidence in the record, including the tape-recorded conversations, to support such an allegation. There is no evidence that Longo took any action in furtherance of the alleged conspiracy.

Rather, Plaintiff alleges that Thomas Longo used his political influence by telling Judge Celebrezze that if Judge Celebrezze wished Thomas Longo to throw his political support in favor of the candidacy of Frank D. Celebrezze, that James Celebrezze would have to obtain Mr. Wagner's political support for Thomas Longo's candidate of choice for ward leader, Rose Lovano. Certainly, this exercise of Thomas Longo's independent First Amendment constitutional rights is not conspiratorial conduct which can support liability as to Thomas Longo. Thomas Longo's decision or intimation to support candidates who use their own political influence in support of candidates of Thomas J. Longo's choosing is likewise not a violation of Plaintiff's constitutional rights. *See Pickering*, *supra*.

Judge Celebrezze did not violate Plaintiff's constitutional rights by terminating him for his political affiliation in support of a candidate opposed by Judge Celebrezze. Judge Celebrezze sought to obtain political support by throwing his endorsement and that of his bailiff behind the candidate proposed by Thomas J. Longo. This political difference of opinion between Judge Celebrezze and Petitioner Wagner was a difference of political affiliation sufficient to support Plaintiff's discharge under the *Branti*, *supra*, line of cases.

Equally importantly, Thomas J. Longo did not violate Plaintiff's constitutional rights by engaging in his own First Amendment protected political activity. There is absolutely no

evidence or information that Thomas Longo attempted to convince, coerce or even suggest that Judge Celebrezze terminate Mr. Wagner should he refuse to endorse the Longo backed candidate. Rather, Thomas Longo engaged in perfectly appropriate political activity by indicating he would only support Judge Celebrezze's candidate if Judge Celebrezze and his bailiff supported the opposition candidate for ward leader. Certainly, there is no constitutional violation by Thomas J. Longo for this type of political accommodation.

CONCLUSION

Based on the foregoing, Defendant Thomas J. Longo asserts he has not violated Plaintiff's constitutional rights by the statement attributed to him, that he would support a candidate in opposition to Frank D. Celebrezze unless James Celebrezze and Frank Wagner supported Rose Lovano for the position of ward leader.

As this case represents only an application of clear and previously existing constitutional precedent from this Honorable Court, Defendant asserts Plaintiff's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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